BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PEARLIE J. REESE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,008,289
KANSAS PLATING, INC.	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the September 28, 2004 Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits for injuries suffered through a series of accidental injuries beginning October 9, 2002, through January 3, 2003, her last day worked before claimant underwent carpal tunnel surgery for the injuries suffered while employed with respondent. The Appeals Board (Board) heard oral argument on March 8, 2005.

APPEARANCES

Claimant appeared by her attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Richard L. Friedeman of Great Bend, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

The only issue raised for review is the nature and extent of claimant's injury. More particularly, did claimant put forth a good faith effort to obtain employment after leaving respondent or should a wage be imputed pursuant to K.S.A. 44-510e? Additionally, what, if any, task loss did claimant suffer as a result of her work-related injuries?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds as follows:

Claimant began working for respondent as a masker in April of 1999. Her job required that she mask off certain parts before they were painted. Claimant was required to obtain an object weighing anywhere from one to fifty pounds, take it to a table, where she would apply tape with a tape machine, cut the tape with a knife and then, after completing the taping job, transport the item to the paint room.

Claimant began developing bilateral hand complaints in October 2002. She reported her symptoms to her supervisor and was sent to Wesley Clinic where she was given splints to wear on the job. Claimant continued performing her same work, with the problems in her upper extremities continuing. Claimant was referred back to Wesley Clinic and then to John Osland, M.D., at the Wichita Clinic. Nerve conduction studies were performed, and claimant was referred to physical therapy. Ultimately, Dr. Osland performed carpal tunnel surgery on claimant's left upper extremity.

Claimant was offered surgical release for her right upper extremity. However, claimant's left upper extremity symptoms did not improve after the surgery. Claimant, therefore, declined the opportunity to undergo surgery to her right upper extremity, noting the lack of improvement in the left.

Claimant was unable to return to employment with respondent based upon the resulting medical restrictions and was officially terminated on March 19, 2003.

Claimant then attempted to obtain unemployment, but was unsuccessful. She began seeking other employment on October 27, 2003. Claimant testified that up to that point she was receiving workers compensation temporary total disability checks. She started seeking employment when the checks stopped.

During claimant's job search, she compiled a list of businesses at which she made contact and/or made application. This list of businesses,[1] which is dated from October 27, 2003, through April 8, 2004, was placed into evidence and discussed at length. Claimant testified that she did not make the list all at once, but made the list as she made contacts with various businesses. Claimant also testified that many of these businesses were running want ads, showing positions available, and that she contacted the businesses and made application at many of the businesses on the list. As of the regular hearing, claimant was unsuccessful in obtaining employment, although her efforts continued.

After treatment, claimant was referred to two physicians for examination. J. Mark Melhorn, M.D., a board certified orthopedic surgeon who limits his practice to hand and upper extremity complaints, examined claimant at the request of respondent's attorney. Dr. Melhorn first saw claimant on September 4, 2003, with follow-up examinations on September 11, 2003; September 23, 2003 (after claimant underwent a nerve conduction study); September 30, 2003; and October 21, 2003. Dr. Melhorn reviewed the office notes from Dr. Osland, as well as his surgical information. Dr. Melhorn further reviewed the nerve conduction studies, diagnosing claimant with left carpal tunnel syndrome post surgery; painful right and left wrist and hand and upper extremities; and neurapraxia, which he described as being an abnormal feeling in claimant's hands. He examined claimant again on September 11, 2003, and, at some time, obtained the nerve conduction studies which had been performed on April 24, 2003. The follow-up nerve conduction studies done on September 16, 2003, were then compared to the April nerve conduction studies. Dr. Melhorn testified that he believed it possible claimant's job activities contributed to the symptoms in her hands and led to the need for treatment on the left hand, including the carpal tunnel surgery.

Dr. Melhorn rated claimant pursuant to the fourth edition of the AMA *Guides*,[2] at a 2.2 percent to the right and left forearms, which combines to a 2 percent impairment to the body as a whole. He restricted claimant to a combined maximum of 50 pounds lifting and carrying on an occasional basis, with a 25-pound frequent lift and carry limitation, and recommended task rotation. Dr. Melhorn then examined a task list created by vocational expert Dan Zumalt, finding claimant incapable of performing three of the twenty-two tasks on the list, for a 14 percent task loss.

Mr. Zumalt was also provided a copy of claimant's list of job contacts. He testified he followed up on the contact list, attempting to contact any business on the list with four or fewer locations in Wichita. He further limited his search to only those contacts which were listed as having occurred in the year 2004. This resulted in his contacting thirty-four

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[1] R.H. Trans., Cl. Ex. 1.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

businesses. Of those, one acknowledged that claimant had filed an application, thirteen were either unwilling or unable to say and twenty advised they had no record of claimant applying at their businesses. Claimant objected to Mr. Zumalt's testimony, arguing that any information he would have obtained from the businesses during his search would have been hearsay and, therefore, excludable under the Workers Compensation Act. However, hearsay evidence may be admissible in workers compensation litigation.[3] The Board will, therefore, consider the testimony of Mr. Zumalt.

Claimant was also referred for an examination to Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation and in electrodiagnostic studies. This referral by claimant's attorney resulted in two examinations, the first being on January 29, 2003, at which time Dr. Murati performed an independent medical examination and made treatment recommendations. A second examination on September 10, 2003, was for the purpose of obtaining a rating and specific restrictions. At the time of the examination, claimant complained of tingling and numbness bilaterally, with sharp pain in both arms, radiating up into the forearms. Dr. Murati diagnosed bilateral carpal tunnel syndrome, with the left post surgery. He placed claimant on restrictions, including no climbing ladders; no heavy grasping with either hand; no lifting, carrying, pushing or pulling greater than 20 pounds and that occasionally; with occasional repetitive grasping or grabbing, and frequent repetitive use of hand controls up to 10 pounds. He allowed for frequent lifting, carrying, pushing or pulling of up to 10 pounds, but restricted claimant from using hooks, knives or vibratory tools. He also recommended claimant use hand splints both while at work and at home.

Dr. Murati assessed claimant a 12 percent impairment to the body as a whole based upon the fourth edition of the AMA *Guides*.[4]

Dr. Murati then reviewed a task list prepared by vocational expert Jon Rosell, Ph.D., at which time Dr. Murati opined claimant was unable to perform ten of the fourteen tasks on the list, resulting in a 71 percent loss of task performing ability.

Dr. Murati acknowledged, on cross-examination, that other than office notes from Dr. Osland and Bruce Buhr, M.D., he had no notes from Dr. Melhorn, no nerve conduction studies to review nor any other tests. Dr. Murati had no radiographic films or studies and no emergency room reports. He did not perform a Tinel's test on claimant, nor a Phalen's test, but did testify he did a carpal compression test, which he described as being a combination of a Phalen's test and a compression examination. He also agreed that at the first examination, he did a carpal compression test on the right only, with no mention of the

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[3] K.A.R. 51-3-8(c).

[4] AMA *Guides* (4th ed.).

carpal compression test on either extremity at the time of the second examination. He recommended claimant undergo nerve conduction studies or an EMG, but none were performed. He made his diagnosis partly based upon the diagnosis by Dr. Osland and partly upon claimant's complaints during the examination. He noted that the report indicated no signs of carpal tunnel problems on the right or the left, with the nerve conduction study being normal. However, he acknowledged he did not have a copy of a nerve conduction test to review.

Claimant alleged a series of accidents through January 5, 2003. Claimant testified her last day worked was the Friday before January 6, 2003, the date she had surgery. That date would be January 3, 2003. That is the date adopted by the Board as the date of accident, as it would have been the last day worked by claimant prior to her carpal tunnel surgery.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[5] K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[6]

The ALJ, in reviewing both the opinion of Dr. Melhorn and that of Dr. Murati, opined that with Dr. Melhorn's reputation for being conservative and Dr. Murati's reputation for being liberal, the truth, in all likelihood, landed somewhere in the middle. He, therefore, averaged the two impairments, resulting in a 7 percent impairment of function to the body as a whole. The Board, in reviewing the evidence, adopts that finding, affirming the ALJ's determination that claimant has a 7 percent impairment to the body as a whole on a functional basis.

K.S.A. 44-510e goes onto define permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average

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[5] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

[6] K.S.A. 44-510e(a).

> weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[7]

Both Dr. Melhorn and Dr. Murati provided a task loss opinion pursuant to K.S.A. 44-510e. The ALJ, in reviewing the evidence, elected to average the opinion of Dr. Melhorn at 14 percent, with that of Dr. Murati. However, the ALJ inaccurately calculated Dr. Murati's task loss at 28 percent. The Board, in reviewing the evidence, finds that Dr. Murati's task loss opinion, showing a loss of ten of fourteen tasks, is in reality 71 percent. The Board finds no justification in placing greater weight on one opinion over that of the other and, therefore, will average the two opinions, resulting in a task loss of 42.5 percent.

With regard to whether claimant suffered a loss of wage earning capacity, the Board must consider the logic of the Kansas Court of Appeals in *Foulk*[8] and *Copeland.*[9] In *Foulk*, the Kansas appellate courts held that a claimant may be barred from receiving workers compensation disability benefits if the claimant is capable of earning 90 percent or more of his or her post-injury wage at a job within his or her restrictions, but fails to do so or actually or constructively refuses to do so. In this case, claimant was unable to return to her employment with respondent, as the medical restrictions precluded her from performing her regular job and respondent was unable to accommodate her restrictions. The Board, therefore, finds *Foulk* does not apply.

In *Copeland*, however, the Kansas appellate courts held that, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[10]

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[7] K.S.A. 44-510e(a).

[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[10] Id. at 320.

In this instance, claimant has provided for the ALJ's and Board's review a lengthy list of job contacts, which claimant testified she created while pursuing employment after being terminated by respondent. Claimant testified about contacting these businesses, filing applications with many and even returning to some of those businesses with follow-up contact. The Board finds the testimony of claimant carries more weight in this instance than the hearsay testimony of Mr. Zumalt regarding claimant's job search. The Board further finds, based upon claimant's testimony and the list of contacts, that claimant has put forth a good faith effort to obtain employment and, pursuant to K.S.A. 44-510e, has suffered a 100 percent loss of wages. Pursuant to K.S.A. 44-510e, the Board will average claimant's 42.5 percent loss of task performing ability with her actual loss of wages, resulting in a permanent partial general disability of 71.25 percent. The Award of the ALJ is modified accordingly.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated September 28, 2004, should be, and is hereby, modified, and claimant is granted an award against the respondent for injuries suffered through January 3, 2003, and based upon the stipulated average weekly wage of $591.53. Claimant is entitled to 54.57 weeks of temporary total disability compensation at the rate of $394.37 per week totaling $21,520.77, followed by permanent partial general disability compensation at the rate of $394.37 per week, for a total award not to exceed $100,000 for a 71.25 percent permanent partial general disability.

As of March 17, 2005, there is due and owing claimant 54.57 weeks of temporary total disability compensation at the rate of $394.37 per week totaling $21,520.77, followed by 60.29 weeks of permanent partial general disability compensation at the rate of $394.37 per week totaling $23,776.57, for a total due and owing of $45,297.34, which is all due and owing in one lump sum minus any amounts previously paid. Thereafter, the remaining balance of $54,702.66 shall be paid at the rate of $394.37 per week, for a total award not to exceed $100,000, until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings contained herein.

IT IS SO ORDERED.

Dated this ____ day of April 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I agree with the majority's conclusion regarding claimant's work disability. But I would sustain claimant's objection to the hearsay testimony provided by Mr. Zumalt. The administrative regulation cited by the majority states that hearsay evidence "may" be admitted. In this instance, admitting that testimony is not justified.

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority. This Board Member does not find claimant's testimony regarding her job search to be credible. The followup investigation done by Dan Zumalt, the vocational expert, contradicted claimant's alleged job search efforts, finding an extremely limited job search on claimant's part, with claimant's actual contacts being nearly nonexistent. Claimant alleges this is hearsay, which, as the Board noted above, may be admissible. This Board Member would find that Mr. Zumalt, in performing activities which he regularly performs as a vocational expert, seriously damaged claimant's credibility in this instance. This Board Member would, therefore, find that claimant has failed to put forth a good faith effort to obtain employment pursuant to *Copeland*[11] and would impute a wage based upon the opinion of Mr. Zumalt

[11] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

that claimant can earn $7 per hour, plus $3.30 an hour fringe benefits, for a total of $10.30, or a weekly wage of $412. This would result in a wage loss of 30 percent.

Additionally, this Board Member would adopt the opinion of Dr. Melhorn regarding the functional impairment suffered by claimant of 2 percent to the body and with regard to the 14 percent task loss opinion utilizing the task list created by Mr. Zumalt. The opinion of Dr. Murati cannot be deemed credible considering the multitude of evidence which was not available to Dr. Murati, including x-rays, Dr. Osland's examination records, Dr. Melhorn's examination records and nerve conduction studies. Additionally, Dr. Murati did not perform Tinel's tests or Phalen's tests on claimant and, at the time of the second examination, did not even conduct a carpal compression test, which he substituted in favor of the Phalen's test the first time he examined claimant. Considering the fact that Dr. Murati recommended nerve conduction studies and EMGs, this Board Member finds it unusual that those studies, while performed, were not provided to Dr. Murati during his second examination of claimant on September 10, 2003.

For the above reasons, this Board Member would impute to claimant a $412 average weekly wage, resulting in a 30 percent wage loss, adopt Dr. Melhorn's 14 percent task loss and, in combining the two, award claimant a 22 percent permanent partial general work disability for the injuries suffered while employed with respondent.

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director